It therefore seems that while the weight of American authority is not in favor of granting a new trial on the assumption that the defense was not sufficiently strong yet there is a sharply defined line beyond which we cannot go. The case of *People v. Blevins, supra,* is one very close to the dividing line and might be justly decided in either way but the including of the weakness of the defense in the assignments of error is fully justified both on principle and authority.

THE EFFECT OF A PAROL AGREEMENT LOCATING A BOUNDARY BETWEEN ADJOINING ESTATES.

Throughout the history of this country uncertain and disputed boundary lines have constantly given the courts of the various States many cases for decision. As was to be expected, different judges took different views of questions of law arising from similar facts, and at first there was a wide variance between the laws of a number of the States. Most of this diversity of opinion was concerning the effect of a parol agreement between adjoining owners establishing the location of a disputed or uncertain boundary between their lands. Many of the earlier decisions were in direct conflict, entirely irreconcilable, but gradually one view came into favor and was adopted by the courts of a large majority of the States.

In *Taylor v. Rudy,* 137 S. W. (Ark.), 574, a recent case before the Supreme Court of Arkansas involving the boundary question, the plaintiff brought an action to restrain the defendant from obstructing a stream of water which ran through the land of each, alleging that such obstruction caused the water of the creek to back up and overflow his lands, thereby causing much damage to certain buildings and their contents. The defendant contended that these buildings were upon his land and not upon the land of the plaintiff. The evidence showed that there had been uncertainty as to just where the boundary line was located, and that by parol agreement the prior owners had fixed a boundary between their respective possessions, and had continued to occupy the lots with reference to this agreement until the conveyance to the plaintiff and defendant in this action. According to this division the buildings stood upon the land owned by the plaintiff, and the only

question was whether the parol agreement was valid and binding. The Court held that it was and gave judgment for the plaintiff.

In the opinion the Court said that where there is uncertainty as to the boundary or where the owners of adjoining lands are in dispute as to the dividing line, the parol agreement of such owners as to the boundary establishes the line, and when followed by possession with reference thereto is conclusive on them. *Payne v. McBride,* 131 S. W. (Ark.), 463, was there cited and the doctrine as stated in that case is substantially the same, with the addition that the possession with reference to the agreed boundary need not be for the full period of the statute of limitations. In many other jurisdictions this opinion is reiterated and regarded as settled law therein, notably, *Kitchen v. Chantland,* 105 N. W. (Iowa), 367, and *Vosburg v. Teator,* 32 N. Y., 561; but in some the rule is less strict, the agreement alone being deemed sufficient without acquiescence or possession. *Patterson et al. v. Meyer,* 114 Pac. (Okl.), 256; *Hastings v. Stark,* 36 Cal., 122.

In all cases it is essential to the validity of the agreement that there should be a dispute or uncertainty as to the line, and in some, as already noted, there is the additional necessity of acquiescence or occupation following the agreement. Concerning the former it is said in 4 *American and English Encyclopaedia,* 859: "A practical location of the boundaries of two coterminous estates by the act of the parties has been held to determine the boundaries and fix the rights of the parties. A limitation to the efficiency of this method of determining boundaries is found in the provision of the statute of frauds prohibiting a parol transfer of title to land. The judicial expressions upon this subject are not easily reconciled, but by the weight of authority, in order to avoid the statute, the location must determine a boundary previously unascertained and uncertain; or there must be an acquiescence in the actual location for a period greater than the statute of limitations; or there must be an element of actual estoppel in the case which will prevent one of the parties from asserting his title." Thus it is said in *Olin et al. v. Henderson,* 79 N. W. (Mich.), 178, that there must have been a doubt or controversy as to the true line; otherwise the case comes within the prohibition of the statute. Where the boundary is known and not in doubt the agreement is void. *Gilchrist*

v. MvKee, 9 Yerg. (Tenn.), 456; *Northern Pine Land Co. v. Bigelow and Another,* 84 Wis., 157.

But what is the effect of the agreement where the boundary is in doubt at the time it is made, but the true location is afterward discovered? Here there is a conflict of opinion. In some States it has been decided that the agreement binds the parties though it is not the true line, and though the true line is afterward determined. *Provident National Bank v. Webb,* 128 S. W. (Tex.), 426; *Loustalot v. McKeel,* 108 Pac. (Cal.), 707. Perhaps a greater number, however, have decided that where the parties agree as to the location of the line thinking it the true one, or where the true line is discovered after the agreement, the agreement is not binding and either party may claim up to the true line. *Gove v. Richardson,* 4 Greenl. (Me.), 327; *Jackson v. Perrine and Wife,* 35 N. J. Law, 137; *Bailey v. Jones,* 14 Ga., 384.

This latter rule, as well as the one requiring acquiescence or possession, probably arose from the belief that the allowance of these parol agreements was a judicially created exception to the statute of frauds. This is now considered erroneous, and the section of that statute forbidding a transfer of title to land by parol is held to be not applicable. In *Hagey v. Detwiler,* 35 Pa. St., 409, this is explained in accordance with the weight of authority as follows: "It is supposed (by counsel) that boundaries fixed by parol are within the operation of the statute. This is a mistake. The statute is a rule of conveyance; it requires a writing to *create* an estate or interest in lands, that shall have more force or effect than a lease or estate at will only. But adjoining owners who adjust their division by parol do not create or convey any estate whatever between themselves; no such thought or intention influences their conduct; after their boundary is fixed by consent, they hold up to it by virtue of the title deeds, and not by virtue of a parol transfer. Generally, indeed, they feel that their rights as defined in the title papers, have been abridged rather than enlarged by the agreed line; and this, because their treaty proceeds on the basis that the exact right between them is doubtful. Out of the doubtfulness of the right springs the consideration which binds the parties to such agreements." Again, in *Vosburgh v. Teator, supra,* "It may be regarded as settled law at this day, that the settlement of a disputed boundary line between the parties

by arbitrament or parol, and especially where equivalents of benefit or advantage are mutually received and acted on, will bind the parties to it, not by way of transferrnig title from one to the other, which the statute of frauds prohibits, but operates by way of estoppel."

The courts almost universally have now adopted the view expressed in the above cases. But formerly not a few judges refused to give effect to a parol boundary agreement because they looked upon it as a transfer of title within the statute. *Phillips v. Eades,* 1 Ky. Law Reporter, 425, is a case in point. There it is said that while a parol agreement as to the location of a boundary would be within the statute of frauds, yet such agreement would conduce to show that such was the true line. *Small v. Hamlet,* 24 Ky. Law Reporter, 238, and *Campbell v. Combs,* 25 Ky. Law Reporter, 1643, are to the same effect, but they now stand almost totally unsupported by authorities elsewhere.

In brief then, the law, as supported by the better opinion and the weight of authority, may be stated thus: Where between adjoining landholders there is a dispute or uncertainty as to the location of a boundary line, they may make an oral agreement establishing the line and it will be binding upon them, at least when followed by acquiescence or possession, though such possession need not be for the period of the statute of limitation of actions. Furthermore, it should be added, that "the agreement may be express or implied," *Clayton v. Feig,* 179 Ill., 554; 54 N. E., 149, and is binding not only upon the parties, but also upon those holding under them. *Hastings v. Stark, supra, Taber v. Hall,* 23 R. I., 613. Though it has been held that if unrecorded it is void as to innocent third persons without notice. *Kittridge v. Landry,* 2 Rob. (La.), 72.

So it must be concluded that *Taylor v. Rudy, supra,* was decided in accordance with the great weight of authority; that the agreement made by the contestants' devisors was valid and binding, and, therefore, that the decision for the plaintiff was correct.